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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

THE PEOPLE, Plaintiff and Respondent, v. KEVIN JAMES GARBI, Defendant and Appellant.	C086126 (Super. Ct. No. 62-144272)

Defendant Kevin James Garbi pleaded no contest to two counts of committing a lewd and lascivious act upon a child. The trial court denied probation and sentenced him to an aggregate term of eight years. On appeal, defendant contends the court abused its discretion in denying his request for probation and sentencing him to the middle term on the principal count. We find no abuse of discretion and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant molested his two children multiple times when his daughter, "Jane Doe," was between the ages of approximately five and six years old and his son, "John

Doe," was between the ages of approximately three and four years old. He told Jane not to tell her classmates what he had done or else the " 'bad things' would happen again." Defendant also told Jane " 'not to tell people what happened' or else [defendant] would 'get in trouble.' "

Defendant was charged with three counts of committing a lewd or lascivious act upon a child in violation of Penal Code section 288, subdivision (a).[1] Counts one and two were committed against Jane Doe. Count three was committed against John Doe. It was further alleged that the offenses were violent and serious felonies within the meaning of sections 667.5, subdivision (c), and 1192.7, subdivision (c)(6). Finally, it was alleged under the one strike law that defendant committed a specified offense against more than victim. (§ 667.61, subds. (c) & (e)(4).)

Defendant subsequently pleaded no contest to counts one and three. In exchange, count two was dismissed and the maximum sentence defendant could receive was 10 years in state prison. Following entry of his plea, Dr. Deborah Schmidt was appointed to evaluate whether defendant was a candidate for probation under section 288.1. During the evaluation, defendant denied most of the victims' allegations. Nevertheless, Dr. Schmidt concluded that defendant would be a suitable candidate for probation as long as he participated in a sex offender treatment program and took his psychiatric medication. She also noted that defendant's test results indicated that "he responded to the test questions in a socially desirable manner" and "his profile must be interpreted with caution."

Before sentencing, the probation department found criteria both for and against a discretionary grant of probation but recommended granting probation based on Dr. Schmidt's opinion that defendant did not present a danger as long as he consistently took his psychiatric medication and participated in a sex offender treatment program.

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[1] Undesignated statutory references are to the Penal Code.

The probation report summarized defendant's examinations by several doctors in connection with a possible insanity defense following his arrest; the doctors all concluded that he suffered from a bipolar disorder but disagreed as to whether he understood the nature and quality of his acts during the commission of the offenses. Defendant was diagnosed with bipolar disorder in approximately 1990 and was prescribed lithium, but he stopped taking the medication to pursue alternative treatments. During the sentencing hearing, defense counsel argued that if defendant is able to maintain his medication for his bipolar disorder, he would be able to comply with probation and would have a very low likelihood of reoffending. He also noted that defendant had no significant criminal record apart from a trespass, which was precipitated by his disorder.

After hearing argument, the court indicated that it "carefully review[ed] the facts in the probation report," "the doctors' reports that were submitted," and the criteria affecting probation listed in section 1203.066 and California Rules of Court, rule 4.414. The court found that this was not an appropriate case for probation because (1) there were two victims, defendant touched Jane Doe more than one time, he told her not to tell anyone because "bad things can happen," (2) family members unsuccessfully attempted to intervene without reporting defendant to law enforcement, (3) defendant has mental illness but was competent and understood what he was doing, (4) the severity and nature of the offenses indicated that defendant is a danger to the public and to his children, (5) it would not be in the best interests of defendant's children for him to receive probation, (6) defendant was at high risk of reoffending if he were to stop taking his medication again, (7) the victims were particularly vulnerable and defendant took advantage of a position of trust, and (8) defendant caused the victims serious emotional injury.

The trial court sentenced defendant to an aggregate term of eight years in state prison, as follows: the middle term of six years for count one and a consecutive term of two years, one-third the middle term, for count three. In choosing the middle term for the first count, the court noted that defendant instructed Jane Doe not to tell anyone what he

did to her and touched her in multiple incidents. In mitigation, the court noted that defendant lacked a prior criminal record and had mental health issues but concluded that on balance, the aggravating factors outweighed the mitigating factors.

DISCUSSION

I

Denial of Probation

Defendant contends the trial court abused its discretion in denying his request for probation. Specifically, he contends that the court erred in finding that he did not meet all of the conditions for probation eligibility under section 1203.066. We disagree.

"In enacting section 1203.066 it appears that the Legislature intended that state prison be the sentencing norm in child molestation cases . . . and that the defendant bear the burden of persuading the court to depart from that norm by granting probation." (*People v. McLaughlin* (1988) 203 Cal.App.3d 1037, 1039.) Thus, a defendant convicted under section 288 is ineligible for probation when certain aggravating circumstances exist, as listed in section 1203.066, subdivision (a). Further, even if such a defendant does not fall within subdivision (a) of section 1203.066, the court may only grant probation if each term and condition set forth in subdivision (d)(1) is met. Finally, even if a defendant meets the conditions overcoming presumptive ineligibility, the court must then exercise its discretion in deciding whether to grant probation based on the criteria set forth in California Rules of Court, rule 4.414. The defendant bears a heavy burden when attempting to show an abuse of discretion. (*People v. Aubrey* (1998) 65 Cal.App.4th 279, 282.) "In reviewing [a trial court's determination whether to grant or deny probation,] it is not our function to substitute our judgment for that of the trial court. Our function is to determine whether the trial court's order granting [or denying] probation is arbitrary or capricious or exceeds the bounds of reason considering all the facts and circumstances." (*People v. Superior Court* (*Du*) (1992) 5 Cal.App.4th 822, 825.)

As a preliminary matter, section 1203.066, subdivision (a)(7) prohibits granting probation to "[a] person who is convicted of committing a violation of Section 288 or 288.5 against more than one victim." Here, while the criminal complaint did not specifically plead that defendant was ineligible for probation under section 1203.066, subdivision (a)(7), it did allege facts making defendant ineligible for probation; defendant was charged with and pleaded no contest to two counts of violating section 288 against two victims on two separate occasions. While the probation report analyzed defendant's case under the presumptive ineligibility factors listed in section 1203.066, subdivision (d)(1), and the trial court denied him probation after reviewing those factors, the court also correctly found that the fact there were two victims was an aggravating circumstance. The court could and should have found defendant conclusively ineligible for probation on this basis. (§ 1203.066, subd. (a)(7).) Thus, the court's judgment denying probation was correct on this ground. (See *Green v. Superior Court* (1985) 40 Cal.3d 126, 138 [an appellate court reviews judicial action rather than judicial reasoning and will affirm if the superior court's ruling is correct on any theory].)

Further, even if defendant were presumptively ineligible for probation under section 1203.066, subdivision (d)(1), rather than conclusively ineligible under subdivision (a)(7), the trial court properly denied him probation. Subdivision (d)(1) provides that if a person is convicted of violating section 288 and factors prohibiting probation stated in section 1203.066, subdivision (a) are not "pled or proven," then probation may be granted only if *all* of the specified terms and conditions are met. These terms and conditions include that the court finds that probation is in the best interest of the child victim, rehabilitation of the defendant is feasible and defendant is amenable to treatment, and that there is no threat of physical harm to the victim if probation is granted. (§ 1203.066, subd. (d)(1)(A), (B), (C) & (E).)

Here, the trial court found that defendant's case did not meet the first condition, reasoning that probation was not in the children's best interests because if defendant were

to stop taking his medication again, "there would be a very high risk of him reoffending." This finding is supported by Dr. Schmidt's conclusion that defendant could pose a danger if he does not consistently take his medication. Dr. Schmidt offered no opinion on the best interests of the children because she did not interview them. Moreover, there is no evidence to affirmatively show that it was in the best interests of the children for their abuser to receive probation.[2] (See *People v. Lammey* (1989) 216 Cal.App.3d 92, 98 ["Here, appellant presented no evidence regarding whether the child's best interest required that he not be imprisoned . . . . Thus appellant failed to carry his burden of persuading the court to grant probation"].) Accordingly, the court was well within its discretion to find that defendant's release on probation was not in their best interests. Because this condition was not met, defendant was ineligible for probation under section 1203.066, subdivision (d)(1).

II

Sentence Imposed

Defendant contends the trial court abused its discretion by imposing the middle term rather than the low term on count one. Specifically, he argues that the court relied on improper aggravating factors and minimized the extent to which his bipolar disorder contributed to the offenses. We again disagree.

A trial court's sentencing decision is reviewed for abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.) A court abuses its discretion when a sentencing decision is "so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony* (2004) 33 Cal.4th 367, 377.) Further, a middle term is a presumptively correct sentence. Former section 1170, subdivision (b), in effect at the

[2] Defendant claims Dr. Schmidt's opinion that he did not pose a threat of physical harm to the victims is affirmative evidence that probation would be in their best interests. Not so. Defendant conflates two distinct conditions, best interests of the children and no threat of physical harm, both of which must be met to overcome presumptive ineligibility under section 1203.066, subdivision (d)(1).

time defendant was sentenced, provided in pertinent part: "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime." (Stats. 2016, ch. 887, § 5.3.) "Aggravating circumstances include those listed in the sentencing rules, as well as any facts 'statutorily declared to be circumstances in aggravation' [citation] and any other facts that are 'reasonably related to the decision being made.' [Citation.]" (*People v. Black* (2007) 41 Cal.4th 799, 817.)

Here, the court imposed the middle term on count one because it found the circumstances in aggravation outweighed those in mitigation. In support of its decision, the court noted that defendant instructed the victim not to tell anyone and he touched her during multiple incidents. While defendant contends these were not proper aggravating circumstances because "it is common in molestation cases for the defendant to have told the victim not to report the crime, and to touch the victim on more than one occasion," he cites no authority to support this argument. Additionally, his claim that the court minimized his mental disorder is not well taken. The court expressly acknowledged that "the mitigating circumstances [are] lack of record, and perhaps his mental health issues helps mitigate it." Defendant emphasizes the court's use of the word "perhaps" as an implication that it did not accord defendant's bipolar disorder due weight. This is not a fair reading of the record. During its evaluations of whether defendant was a candidate for probation, the court discussed his disorder, finding that the totality of defendant's examinations indicated "he was not insane," but "competent" and "understood what he was doing." Thus, while the court considered defendant's disorder a mitigating factor, it appropriately noted defendant's competence and culpability. Defendant has failed to show the trial court's imposition of the middle term was so irrational or arbitrary that no reasonable person could agree with it. (See *People v. Carmony, supra,* 33 Cal.4th at p. 377.) The court did not abuse its discretion.

DISPOSITION

The judgment is affirmed.

KRAUSE, J.

We concur:

MAURO, Acting P. J.

HOCH, J.